Questions and Answers to Complex Issues Raised at the International Conference on Children

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1) **When does an OOW (out of wedlock) child have two parents? (If a child has two parents, the "sole parent" provision of 101(b)(1)(F) is not applicable, except under 2) b) or c), below.)**
   a) When the mother marries while the child is under age 18. INA § 101(b)(1)(B).
   b) When the child is legitimated while under age 18. INA § 101(b)(1)(C). (More about this under 2) a), below.)
   c) When the natural father has or had a *bona fide* parent-child relationship with the person. INA § 101(b)(1)(D).
   d) When the child has been adopted while under the age of 16 (18 if a sibling under 16 is adopted by the same adoptive parents) and has resided with the adoptive parents and been in their legal custody for at least two years. INA § 101(b)(1)(E).

2) **When can an OOW child who has two parents under (c) above nevertheless be considered an orphan under 101(b)(1)(F)?**
   a) If the natural father has disappeared or abandoned or deserted the child, or
   b) If the natural father has in writing irrevocably released the child for emigration and adoption.
   c) **But not** if the child has been legitimated under the law of the child's residence or domicile or under the law of the father's residence or domicile while under age 18. In a country where all children are considered "legitimate" at birth, the child is considered to be legitimated under the INA if paternity is legally established.

3) **Explain the differences between "abandonment," "desertion," and "separation." Good question! They are very similar.**
   a) "Abandonment" as currently interpreted involves the parents taking action to relinquish their rights, relationship to the child, and control over the child to a competent authority.
   b) "Desertion" is similar, but the chief difference is that the parents' action is to refuse to carry out their parental obligations, with the result that a competent authority steps in to take charge of the child.
   c) "Separation" is described as the intervention of a competent authority to terminate parental rights for cause in cases where the parents may be asserting their rights.

   All result in a severance of the parent-child relationship, making the child an orphan.

4) **How is "loss" different from abandonment, desertion, and separation?**
   "Loss" is something that happens between parents and child—as contrasted with something that parents do or cause to be done—severance of the parent-child relationship due to circumstances beyond the parents' control. This must be verified by a competent authority under the laws of the foreign sending country.

WORKSHOP SCENARIOS FROM REAL LIFE

Scenario 1. Q. A Spanish woman adopted two Chinese foundlings. One has been residing with her in her legal custody for two years, the other for six months. The woman then married a USC who was working in Spain. Both children are under 18. The husband wants to return to the US with his wife and her two children. Can he can file an I-130 for his wife and another for the first child as his stepchild, 101(b)(1)(B)?

A. Yes, because that child fits the definition under 101(b)(1)(E) as to his wife.

Q. Can he petition for the second child as his stepchild?

A. No, because she does not fit the definition under 101(b)(1)(E) for lack of fulfillment of the two-year requirement. The second child isn't a "child" under that definition as to the wife. See Matter of Geronimo, 15 I&N Dec. 526 (BIA 1975). From that it follows that the wife is not the child's "mother" or "parent" under 101(b)(2).

Q. Can the USC file an I-600 for the second child as an orphan under 101(b)(1)(F)? What must you think about to determine this?

A. The child was a foundling, so the parents either died, disappeared, or abandoned the child. Does the child have any parents according to the INA? How about the wife? Well, not under 101(b)(1)(A) (not born to her in wedlock), (B) (not her stepchild), (C) (not legitimated), (D) (not born to her out of wedlock), (E) (not her adopted child, as shown above), or (F) (wife isn't a USC, do child can't meet the orphan requirements). If the child isn't a "child" for immigration purposes under 101(b)(1) as to the wife, it follows that the wife is not the child's mother or parent under 101(b)(2). We know of no other parents. Therefore, the USC husband can petition for the child as an orphan if he and his wife adopt the child jointly or if they meet the preadoption requirements of their intended US residence and the child is coming to the US to be adopted by them jointly. It was argued that the wife is the child's adoptive mother under Chinese or Spanish law and that that fact can block a finding under the INA that the child is an orphan. But if she isn't a mother or parent under 101(b)(2) because the child doesn't fit under 101(b)(1), there does not appear to be a way that she could be a mother or parent to block her husband's petition under (b)(1)(F).

Scenario 2. Q. The child was evidently born out of wedlock: the mother is single and says she does not know who the father is. Needless to say, the unknown father has not recognized the child, so there has been no legitimation. There is no stepfather. The mother is the sole parent. Does a sole or surviving parent have to abandon a child to an orphanage?

A. No, the sole or surviving parent does not have to "abandon" as we define that term. The sole or surviving parent only has to do exactly what the statute says: irrevocably in writing release the child for emigration and adoption. Whether she knows and approves of the prospective adoptive parents or does not makes no difference. Whether she

transfers physical custody to them or appears in court to participate in the transfer of legal custody or does not makes no difference.

Scenario 3. Q. 11/7/68 child born in Philippines. 5/29/73 (age 4) child is adopted by great aunt and uncle. 10/88 (age 19) child leaves adoptive parents to live with natural parents (who, by the way, were married) for a year until they immigrate to the US under 5th preference in 10/89. In 1991 the adoptive mother files a petition for rescission of the adoption, which the court approved 9/24/91 ("child"—no longer a "child" under the INA—is 23). 1/9/92 biological father, an LPR, files family-based second preference petition for his unmarried daughter. Was the beneficiary ever the "child" of her biological father?

A. The beneficiary was the "child" of her biological parents until she was adopted at age 5.

Q. What happened to the beneficiary's relationship with her biological parents when her aunt and uncle adopted her?

A. It depends on Filipino law. If it is similar to American adoption law (state law), when she was adopted, that relationship was legally severed. She lived with her adoptive parents from age 4 to 19. We don't know the reason for the adoption. Something other than for immigration purposes, it seems, since it actually prevented her immigration with her biological parents. When her biological parents immigrated to the US, she was almost 21. It seems she was not listed as their child on the I-130 of which <u>they</u> were beneficiaries. If her adoptive parents had immigrated instead of her biological parents, she could have accompanied them, and her biological parents could have claimed no immigration benefit through her.

Q. Does it matter what the effect of "rescission of adoption" is, or what the basis for it was; whether the effect is simply to nullify the parent-child relationship between the adoptive parents and child or whether the original parent-child relationship that was ended by the adoption springs back into existence? What do you think the reason for it was?

A. It seems likely that the real reason for it was to make it possible for her to join her "aunt and uncle"/biological parents in the US.

Q. Someone from the Philippine Embassy told us that adoptions totally sever the relationship with the birth parents. He said rescission was extremely rare—only for highly unusual situations such as fraud in the adoption. He said nothing about rescission of the adoption having the legal result of restoring the parent/child relationship with the biological parents. If rescission simply terminates the adoption, may the birth parents petition for this person as their unmarried daughter?

A. If the rescission did not restore the original relationship with the birth parents, they may not petition for their birth daughter because their relationship was legally severed.

Q. If the rescission did restore the relationship?

A. We originally said this: "Since the adoptive parents don't stand to gain anything from this rescission, it does not create a dangerous precedent that can be exploited or manipulated by others. If the Filipino law restores the biological family relationship after the rescission, we can recognize the parent-child relationship." Now we're rethinking the whole question.

Scenario 4. Q. There is a case out of Vietnam where the natural mother has been judged incompetent and the grandmother has been designated as the natural mother's guardian and the children's guardian. The law in Vietnam says that, if a person is judged incompetent, the person's mother or father must be the guardian if certain criteria are met. The guardianship ends, according to Vietnamese law when the child turns 18, is returned to the natural parents, or is adopted. The natural father is apparently unknown. Can the grandmother/ guardian release a child for adoption? First, is the mother the sole parent?

A. If the father is unknown, the mother was the sole parent. If the natural mother's parental rights have been terminated, then our definition of "separated from" in 8 CFR s. 204.3(b) may be satisfied in her case, the child has no parents, and the child is an orphan. If the guardian has legal authority to act in behalf of the incompetent sole parent, including authority to release the child for adoption, the grandmother, probably the next of kin, can release her ward for adoption.

Q. What effort must be made to find the natural father?

A. Under US law, an out-of-wedlock father who never had a bona fide relationship with the child is not a parent. INA s. 101(b)(1)(D) and (2). An out-of-wedlock child whose father has not acknowledged him has only a sole parent, the mother. Vietnam may be a country where all children are considered legitimate, and where acknowledgement would constitute legitimation. Therefore, if the father never acknowledged the child (which would seem to be the case here because the facts given say he was unknown), nothing needs to be done. If the father did acknowledge the child, satisfying Vietnamese law making the child legitimate, then under U.S. law then the child has two parents and is not an orphan.

Scenario 5. Q. A child is under 16 when the complete petition is filed and he is an orphan who has not been adopted yet. Preadoption requirements in the state to which he is destined have been met, and the prospective adoptive parents have legal custody. He subsequently celebrates his 16th birthday and is then adopted abroad before immigrating to the United States. Is this a problem?

A. No. Here the petition was filed before the child reached age 16 and appears to have been approvable at the time for a child who was not yet adopted. If a full and final adoption had taken place before filing, it also would have resulted in an approvable

petition. The fact that a full and final foreign adoption takes place after the filing would not have the effect of making the petition unapprovable. Of course, if the foreign adoption is NOT full and final, then the petition could be approved for a child coming to the US to be adopted if the preadoption requirements of the state of intended residence in the US are fulfilled, and a readoption can take place in the US.

Scenario 6. A Filipina woman whose husband died while she was pregnant moved in with her parents after her husband's death. She left the child with her parents when the boy was 6 months old and took no responsibility for him. In 1997 the mother drowned. Both biological parents are dead. The child, now 13, has always lived with his grandparents. According to our information, Article 214 of the Family Code of the Philippines states that, "In the case of death, absence or unsuitability of the parents, substitute parental authority shall be exercised by the surviving grandparent." This article was relied on by the Philippine Intercountry Adoption Board in a letter to the World Association for Children and Parents to justify the grandparent's authority to give the boy up for adoption. Are the grandparents adoptive parents?

A. It would be useful to find out more about what this provision means. It does not mention adoption. It sounds as though the grandparent(s) have legal custody by operation of law and that they are legal guardians, but it does not sound like adoption.

Q. Is this child an orphan?

A. If that is true, the grandparents are not a new set of parents. If they haven't adopted him, he is not their "child" under 101(b)(1) of the Act: he isn't their child born to them in wedlock; he isn't their stepchild; he isn't their legitimated child; he wasn't born to them out of wedlock; they haven't adopted him (so it appears from the quotation of the Filipino law); but his parents are both deceased. Therefore, he is an orphan and can be adopted if the legal custodian--his grandparent--relinquishes him.

Q. What if his aunt wants to adopt him?

A. It is perfectly acceptable that the prospective adoptive parent is his aunt. It is usually a family member who steps in when a child is orphaned. We only get suspicious when a USC aunt adopts the child of her sibling and the sibling's spouse when the biological parents are still living, often in the same household with the child. On paper it looks like an adoption, but on the ground the child is living with his biological parents.

Scenario 7. Married USC petitioners adopt an orphan. The USC prospective father is 27 years old, a church minister who met the child while in Russia conducting a youth camp for orphans. He had previously received a deferred adjudication of guilt for burglary in 1992 and was sentenced to 10 years probation. The burglary was committed when the minister was 17. The home study highly recommends the adoption.

Q. May this petition be approved?

A. If there was full disclosure, full consideration by the home study preparer, and full compliance with our regs at 8 CFR § 204.3(e), INS can accept the recommendation of the home study preparer and, if State review is required, of the State authorities. However, if there is reason to believe that the prospective adoptive parent is a danger to the child, further information can be sought so that either the home study preparer withdraws the favorable recommendation or reconfirms its favorable recommendation. All that the statute requires is a favorable recommendation. INA § 204(d). INS must still decide whether it is satisfied that proper care will be given.